Makok Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

HIGH COURT (KUALA LUMPUR) — APPEAL NO R3-14-3 OF 1994
NIK HASHIM JC
16 SEPTEMBER 1997

Revenue Law *— Income tax — Assessment — Case stated — Amendment of — Whether case stated should be remitted to the Special Commissioners for amendment — Whether case stated was full and fair in that its findings broadly covered the territory desired to be dealt with by the suggested amendment — Whether there was omission that warranted the amendment of the case stated — Whether the court had inherent powers to order amendment to prevent injustice — Income Tax Act 1967 s 24(2)(a) & Sch 5 para 40(a)— Rules of the High Court 1980 O 92 r 4*

Makok Development Sdn Bhd ('the appellant') was assessed for income tax for the year 1983 by the Director General of Inland Revenue ('the respondent'). The appellant appealed against the assessment. The appellant's application was dismissed by the Special Commissioners. The appellant appealed to the High Court. Further, the appellant, dissatisfied with the findings of fact contained in the case stated, applied for an order that the case stated be remitted to the Special Commissioners for amendment to include two additional facts allegedly proved by the appellant. Counsel for the respondent, on the other hand, submitted that the Special Commissioners had considered the suggested facts proved by the applicant as appeared in the case stated.

Held, dismissing the motion with costs:

What is required for a case stated under para 34 of Sch 5 of the Income Tax Act 1967 is that the Special Commissioners are to set forth the facts as found by them, the deciding order and the grounds of their decision. The Special Commissioners in this case had set out the facts admitted and proved and made the deciding order accordingly in the case stated. The case stated was full and fair in that its findings broadly covered the territory desired to be dealt with by the suggested amendment. The Special Commissioners did carefully analyse and scrutinize all the facts before them and, their findings and conclusions were certain and adequate for the purpose of the case stated. There was nothing in the affidavit in support of the motion which disclosed any omission that warranted the remission of the case stated to the commissioners for further amendments to the case stated. A remit would therefore lead to a mere repetition by the commissioners of the findings they had already made or would have to require a rehearing of the whole matter before another panel of Special Commissioners, and probably leading of evidence afresh. This would not bring any benefit and would be quite improper. While the court has inherent powers to make any order as may be necessary to prevent injustice as provided for under O 92 r 4 of the Rules of the

High Court 1980, this was not, however, a fit and proper case for the exercise of such power to make the order (see p 648C–E, G–I). A

[**Bahasa Malaysia summary**

Makok Development Sdn Bhd ('perayu') telah ditaksir cukai pendapatan untuk tahun 1983 oleh Ketua Pengarah Hasil Dalam Negeri ('penentang'). Perayu merayu terhadap taksiran. Permohonan perayu ditolak oleh Pesuruhjaya Khas. Perayu merayu kepada Mahkamah Tinggi. Selanjutnya, perayu, yang tidak puas hati dengan keputusan fakta yang terkandung dalam kes yang dinyatakan, memohon untuk satu perintah bahawa kes yang dinyatakan diremitkan kepada Pesuruhjaya Khas untuk pindaan supaya dimasukkan dua fakta tambahan yang dikatakan dibuktikan oleh perayu. Sebaliknya, peguam penentang menghujahkan bahawa Pesuruhjaya Khas telah mempertimbangkan fakta yang dicadangkan yang dibuktikan oleh pemohon seperti yang kelihatan dalam kes yang dinyatakan. B C

Diputuskan, menolak usul dengan kos: D

Apa yang dikehendaki untuk kes yang dinyatakan di bawah perenggan 34 Jadual 5 Akta Cukai Pendapatan 1967 adalah bahawa Pesuruhjaya Khas hendaklah membentangkan fakta seperti yang didapati mereka, perintah yang memutus dan alasan keputusan mereka. Pesuruhjaya Khas dalam kes ini telah membentangkan fakta yang diakui dan dibukti serta membuat perintah yang memutus sewajarnya dalam kes yang dinyatakan. Kes yang dinyatakan adalah penuh dan adil dalam ertikata pendapatnya meliputi dengan meluasnya perkara yang ingin diuruskan oleh pindaan yang dicadangkan. Pesuruhjaya Khas memang telah menganalisis dan meneliti secara berhati-hati segala fakta di hadapan mereka dan, pendapat dan kesimpulan mereka adalah pasti dan memadai untuk tujuan kes yang dinyatakan. Tiada apa-apa dalam afidavit menyokong usul yang mendedahkan sebarang peninggalan yang mewajarkan peremitan kes yang dinyatakan kepada pesuruhjaya untuk pindaan lanjut. Oleh itu, remitan cuma akan membawa kepada pengulangan oleh pesuruhjaya atas pendapat yang mereka telah pun buat atau akan menghendaki pembicaraan semula keseluruhan perkara di hadapan panel Pesuruhjaya Khas yang lain, dan mungkin pengemukaan keterangan secara baru. Ini tidak akan membawa apa-apa manfaat dan tidak wajar. Manakala mahkamah mempunyai kuasa sedia ada untuk membuat apa-apa perintah yang perlu untuk menghalang ketidakadilan seperti yang diperuntukkan di bawah A 92 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980, namun demikian, ini bukanlah suatu kes yang sesuai dan wajar untuk pelaksanaan kuasa begini untuk membuat perintah tersebut (lihat ms 648C–E, G–I).] E F G H I

Notes

For cases on case stated, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1761–1764.

Cases referred to

Commissioners of Inland Revenue v Tootal Broadhurst Lee Co Ltd 29 TC 352 (refd)
Comptroller-General of Inland Revenue v Lim Foo Yong Sdn Bhd [1983] 1 MLJ 43 (refd)
Consolidated Goldfields Plc v IRC [1990] STC 357 (refd)
Fen Farming Co Ltd v Dunsford [1973] STC 474 (refd)
NYF Realty Sdn Bhd v Comptroller of Inland Revenue [1974] 1 MLJ 182 (refd)

Legislation referred to

Income Tax Act 1967 s 24(2)(a), Sch 5 paras 34, 37, 40(a)
Rules of the High Court 1980 O 92 r 4
Taxes Management Act 1970 s 56(7) [UK]

Appeal from: Case Stated for Appeal No PKR No 521 (Special Commissioners of Income Tax, Inland Revenue Board)

KL Pang (*TJ Su* with him) (*Cheah Teh & Su*) for the applicant.
Salmah bte Kasim (Legal Officer, Inland Revenue Board) for the respondent.

Cur Adv Vult

Nik Hashim JC: This is an application by notice of motion made pursuant to para 40(a) of Sch 5 of the Income Tax Act 1967 ('the Act') for the case stated to be sent back to the Special Commissioners of Income Tax for amendment.

Briefly, the facts are that Makok Development Sdn Bhd ('the applicant') was assessed for income tax amounting to RM649,804 for the year of assessment 1983 by the Director General of Inland Revenue, the respondent. The applicant appealed to the Special Commissioners against the said assessment on the grounds that:

(1) pursuant to s 24(2)(a) of the Act, the withdrawal of No 70, Jalan Bahari, Penang during the basis period ending 31 July 1979 by the applicant for its own use should be treated as a disposal of stock-in-trade with a corresponding liability to income tax from the year of assessment 1980;

(2) the said property should thereafter be regarded as the applicant's fixed asset and not its stock-in-trade; and

(3) accordingly, the applicant should then have been liable for real property gains tax (if any) and not income tax for the subsequent disposal of the property on 31 January 1982.

The Special Commissioners dismissed the applicant's appeal and held that the transfer of No 70, Jalan Bahari, Penang did not amount to 'withdrawn for his own use' within the meaning of s 24(2)(a) of the Act, and thereby

confirmed the assessment. The applicant, being dissatisfied with the findings of fact contained in the case stated, has applied for an order that the case stated be remitted to the Special Commissioners for amendment to add the following facts proved by the applicant:

(a) Notes to the account (as at 31 July 1979 submitted by the applicant to the respondent) in p 138 of the agreed bundle of documents show that No 70 was transferred from stock-in-trade in 1979 to fixed asset by way of accounting entry and this was verified by auditors.

(b) No 70 was retained with the intention of using it as their headquarters until 1982 and No 70 was retained because it was at a strategic place, a corner and it has 4 stories — big space, as the applicant planned to expand their office.

Further or in the alternative, the applicant prays for all the notes of evidence taken by all the members of the Special Commissioners in connection with this appeal (Appeal No PKR 521) be filed in the High Court and be regarded as forming part of the Case Stated filed under para 34 of Sch 5 of the Act. The applicant further prays for the appeal before this court to be stayed pending the amendment and/or the filing of the notes of evidence as prayed for.

Learned counsel for the applicant, whilst admitting that the proposed amendments had been considered by the Special Commissioners in the Case Stated, submitted nevertheless that the proposed amendments ought to have been included in the Case Stated based on the following grounds:

(i) the evidence was not challenged during cross-examination;

(ii) the additional facts were essential to the applicant's appeal;

(iii) the respondent must be deemed to have admitted to the amendments by not replying to the applicant's letter dated 15 October 1994 and not contradicting the contents of the affidavit by Dato' Mak Kok; and

(iv) this is a proper case for the court to exercise its discretion to order the case to be remitted to the Special Commissioners for amendment.

Learned counsel for the respondent, on the other hand, submitted that the Special Commissioners had considered the suggested facts proved by the applicant as appeared at pp 14–19 of the Case Stated.

There seems to be no reported local authority, except one, which deals with the exercise of the court's discretion to remit a case to the Special Commissioners. Sharma J, in *NYF Realty Sdn Bhd v Comptroller of Inland Revenue* [1974] 1 MLJ 182, on his own volition remitted the case to the Special Commissioners on the ground that the Commissioners had failed to give their findings on certain essential facts of the case. In the absence of local authority, perhaps it would be useful to refer to the English case of *Consolidated Goldfields Plc v IRC* [1990] STC 357, on an application for remitter to the commissioners for amendments under s 56(7) of the Taxes Management Act 1970 (UK), which is identical to our para 40 of the Sch 5 of the Act, where Scott J at p 367 said:

> If a request is made for a Case Stated to be remitted for additional findings to be made or to be considered, the applicant must, in my opinion, show that the desired findings are: (a) material to some tenable argument; (b) at least reasonably open on the evidence that has been adduced; and (c) not inconsistent with the finding or findings that have already been made. I would add this: in my opinion, the Commissioners must be protected from nit picking. If the Case Stated is full and fair, in that its findings broadly cover the territory desired to be dealt with by the proposed additional findings, the court should, I think, be slow to send the case back, particularly so if it appears that the Special Commissioners have had the proposed findings in mind when settling the final form of the Case Stated.

With respect, I agree with the above-mentioned criteria, and would adopt and apply the same to the present case. In my opinion, unless the criteria are satisfied, an application for remission would not be granted.

Before the Case Stated was prepared, the parties were given the opportunity to make representations on the draft Case Stated. The applicant subsequently wrote to the Special Commissioners suggesting four amendments, all of which were considered and adopted except one which is the subject of this application.

Authorities have shown that the Special Commissioners need to consider all the suggestions for amendment that have been made, but need not necessarily adopt them (see per Somervell LJ in *Commissioners of Inland Revenue v Tootal Broadhurst Lee Co Ltd* 29 TC 352 at p 361). To consider a piece of evidence does not necessarily mean to accept it. The decision to accept or to reject it depends upon the probative value which the tribunal concerned would place upon such piece of evidence. The Special Commissioners are entitled to draw their own conclusion from the facts found by them (per Salleh Abbas FJ in *Comptroller General of Inland Revenue v Lim Foo Yong Sdn Bhd* [1983] 1 MLJ 43). The Special Commissioners are not required to state in detail the evidence which had been adduced before them, for the acceptance or rejection of the evidence is a matter for the Commissioners only (*Fen Farming Co Ltd v Dunsford (Inspector of Taxes)* [1973] STC 474).

Applying the above principles to the present case, with respect, I agree with the submission of counsel for the respondent that the proposed amendment to add facts proved by the applicant had been taken into account sufficiently by the Special Commissioners in the Case Stated. With regard to the proposed point (a) above, the Special Commissioners have covered it under facts proved at p 7 para b(ii), and at pp 15–19 of the Case Stated. For instance, at p 19, the Special Commissioners came to the conclusion on the evidence of the witnesses (SP1 and SP2) and the documents of the applicant when they said:

> Neither the two witnesses called by the appellants nor did the documentary evidence tendered by them corroborate the entry in any way. SP1 merely gave evidence on what is contained on p 138 of the agreed bundle of documents.

Thus, point (a) is fully covered by that conclusion. Similarly, on point (b), the Special Commissioners also covered it well under facts admitted at

pp 3–4 at items (iv) and (v), and at pp 20 item (e), 22, 23 and lastly at p 26, they said: A

> It must be noted that whether a dealing is an asset of a capital or revenue nature is a question of fact ... . In this case, it is clear that the dealing in the property was a trading stock and the fact that it had been retained by the appellants for their own use before its sale does not alter its character ... on the facts of the case, the intention of the appellants cannot be considered as determining what it is that their acts amount to ... their intention alone cannot prevail over what in fact they have done ... . Thus the retention of the property in this case does not amount to it being withdrawn for the own use of the appellants within the meaning of the section. B

What is required for a Case Stated under para 34 of Sch 5 of the Act is that the Special Commissioners are to set forth the facts as found by them, the deciding order and the grounds of their decision (see para 37 of Sch 5 of the Act). The Special Commissioners in this case have set out the facts admitted and proved and made the deciding order accordingly in the Case Stated. The grounds of their decision was fully supported by relevant authorities. I find their 27-page Case Stated full and fair in that its findings broadly cover the territory desired to be dealt with by the suggested amendment. The findings and conclusions are based on the evidence before the Special Commissioners. They did carefully analyse and scrutinize all the facts before them and in my view, their findings and conclusions are certain and adequate for the purpose of the Case Stated. Matters such as credibility, materiality and acceptance or rejection of the evidence are primary matters for the commissioners and not for the High Court. Thus, the issue whether the evidence was challenged or not during cross-examination and such evidence is to be accepted or not in the circumstances, is for the commissioners. Regarding the applicant's assertion that the respondent must be deemed to have admitted to the amendments by not replying to the applicant's letter dated 15 October 1994, it is to be noted that that letter was addressed to the Special Commissioners and not to the respondent, and that being so, the respondent was not obliged to reply. It is also pertinent to note that the applicant did not aver in the supporting affidavit that the proposed amendment to add facts proved by the applicant was material for its case. Indeed, there is nothing in the affidavit in support of the motion which discloses any omission that warrants the remission of the Case Stated to the commissioners for further amendments to the Case Stated. A remit would therefore lead to a mere repetition by the commissioners of the findings they have already made or would have to require a rehearing of the whole matter before another panel of Special Commissioners, and probably leading of evidence afresh. This would not bring any benefit and indeed, would be quite improper. C D E F G H

Respecting the alternative prayer for the notes of evidence to be filed as part of the Case Stated, I am of the view that, while not denying that the court has inherent powers to make any order as may be necessary to prevent injustice as provided for under O 92 r 4 of the Rules of the High Court 1980, this is not, however, a fit and proper case for the exercise of such power to make the order. There is no injustice caused in the instant I

A case. The appeal was properly heard and disposed of by the Special Commissioners and consequently, they have prepared a Case Stated in accordance with law for the opinion of the High Court. There is nothing irregular with the Case Stated.

In the result, I do not think there is any respect in which the criteria
B set out in *Goldfields* have been satisfied in this case. Accordingly, I dismiss the motion with costs.

Motion dismissed with costs.

Reported by Shantha Sabapathy

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